U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-D-I- INC.

DATE: JUNE 28, 2018

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an interior design firm, seeks to classify the Beneficiary as an individual of exceptional ability in the sciences, arts, or business, or as a member of the professions holding an advanced degree, under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business or an academic degree above that of baccalaureate. The Petitioner also seeks designation under 20 C.F.R. § 656.5, Schedule A, Group II. Schedule A, Group I as well as Group II, is comprised of certain occupations for which the Department of Labor (DOL) has determined there are not sufficient United States workers who are able, willing, qualified, and available, and that the employment of these foreign nationals will not adversely affect the wages and working conditions of similarly employed United States workers. *Id.*

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary had ten years of work experience as an artistic director, and thus met the minimum experience requirements for the offered artistic director position as specified on ETA Form 9089, Application for Permanent Employment Certification. We denied the Petitioner's appeal on the same ground, but also determined that the Petitioner did not establish that the Beneficiary's intended work in the United States will require exceptional ability as required under 20 C.F.R. § 656.15(d)(1).

On motion to reconsider, the Petitioner asserts that we should accept the amended Form ETA 9089 submitted on appeal, which the Petitioner contests is not barred by 20 C.F.R. 656.11(b), and that the Beneficiary meets the experience requirements for the offered position in that amended ETA 9089. Alternatively, the Petitioner asserts that the job title of the offered position, artistic director, is the Petitioner's title for the job duties classified by DOL under SOC 27-1013, fine artist, and thus that the Beneficiary's experience as a fine artist qualifies him for the position. In response to the second grounds for dismissal in our appeal, the Petitioner presents several arguments which will be discussed in detail below.

Upon review, we will grant the motion and sustain the appeal.

I. LAW

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). It must also be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

II. ANALYSIS

The regulation at 8 C.F.R. § 204.5(k)(4) requires the submission of an application for Schedule A designation when applicable, and specifies Form ETA-750 as the form used for that application. The regulation goes on to state, in pertinent part, that "the job offer portion of the... Schedule A application... must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability." The Petitioner submitted ETA Form 9089 as required, and completed the pertinent parts of Part H, Job Opportunity Information, as follows:

3. Job Title: Artistic Director
4. Education: minimum level required: Master's
4-B. Major field of study: Fine Arts
6. Is experience in the job offered required for the job? Yes
6-A. If Yes, number of months experience required: 120
10. Is experience in an alternate occupation acceptable? No
14. Specific skills or other requirements: Exceptional ability in the fine arts as documented by widespread acclaim and international recognition accorded by recognized experts in the field of fine arts.

In Section K of the ETA 9089, Alien Work Experience, the Petitioner indicated that the Beneficiary had been self-employed as a fine artist from August 1, 1995, to the current date.

A. The Beneficiary's Qualification for the Offered Position

On appeal, the Petitioner submitted an amended ETA 9089, which altered the information in Items 10, 10-B and 14 to allow for experience to be gained in the alternate occupations of fine artist or interior designer. However, we determined that we could not consider that amended application, since 20 C.F.R. § 656.11(b) expressly states that such modifications will not be accepted to applications submitted after July 16, 2007. On motion the Petitioner points to supplementary information accompanying both the proposed and final regulations amending DOL's PERM procedures.[1] Upon review, we agree that the supplementary information accompanying the final rule clarifies that the bar to modifications of labor certification applications applies only to those filed with the DOL, and thus not to those filed with USCIS under Schedule A. However, we cannot

[1] 71 FR 7659, Vol. 71, No. 29 2/13/2006

consider the amended 9089 because to do so would be an impermissible material change to the petition. A Petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi,* 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Since the regulation at 8 C.F.R. § 204.5(k)(4) is clear that the job offer portion of the application for Schedule A determination must demonstrate that the offered position requires the equivalent of an alien of exceptional ability, any change to the terms of the job offer after filing of the petition that affects that requirement cannot be entertained.

The Director's decision held that the evidence of the Beneficiary's previous work experience, in the form of letters from art experts as well as the Beneficiary's colleagues, clients and employers, did not show that he met the minimum experience requirements listed in Part H of the ETA 9089. In dismissing the Petitioner's appeal, we stated that, despite the job title of artistic director, many of the job duties were those that a fine artist would routinely perform. However, the letters provided in support of the Beneficiary's experience described some duties that were comparable to other occupations, such as interior designer, graphic designer or art director, and in one instance, restaurant manager. The Petitioner notes on motion that, despite this, our appeal decision found this evidence sufficient to satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) requiring evidence of 10 years of full-time experience in the occupation sought.

Upon review, we agree with the Petitioner that the majority of the job duties listed on the ETA 9089 are those of a fine artist, and note that the evidence indicates that some portion of the Beneficiary's work as an interior designer also included duties typically associated with a fine artist. For example, indicates in his letter that in addition to "leading the design team on the interior of my venue," the Beneficiary also created "unique artworks and art installations for the bar." writes that while designing and overseeing the renovation of her home, the Beneficiary also created original artworks for it. This evidence, when considered together with the evidence of the Petitioner's work strictly as a fine artist, establishes by a preponderance of the evidence that the Beneficiary possesses the required 10 years of experience in the same occupation for which the Schedule A determination is sought.

B. The Beneficiary's Work Will Require Outstanding Achievement

In our appeal decision, we found that the Petitioner had failed to provide sufficient evidence that, as required under 20 C.F.R. § 656.15(d)(1), the Beneficiary's intended work in the United States will require exceptional ability. We noted that in the year prior to the filing of the petition, the Beneficiary had presented his artwork in two galleries, and designed and implemented sculptures and a lighting installation for a high-profile residential development. However, the Petitioner failed to provide specific evidence to show how the Beneficiary's work on its behalf will continue to require exceptional ability.

On motion, the Petitioner first draws attention to the statement in box H-14 of the Schedule A application which generally repeats the regulatory requirement at 20 C.F.R. § 656.15(d)(1). But this statement, without supporting evidence, is insufficient to address the concerns raised in our appeal

decision. Similarly, the Petitioner's assertion that the approval of an O-1 petition, filed on behalf of the Beneficiary by a different employer, establishes that his work for the Petitioner will require extraordinary ability is not supported by the record or the regulatory language referenced in the Petitioner's brief. However, the Petitioner also points out that while the Beneficiary was not its employee when he contributed to the project, it was responsible for the interior design of that project, and the Beneficiary's future work on similar projects for the Petitioner will also require exceptional ability. As we found in our appeal decision that the Beneficiary's work on that project denoted exceptional ability in his field, and because the Petitioner has established that its reputation in the interior design field carries the expectation of similar high-profile projects to which the Beneficiary may be assigned, we find that the Petitioner has established that the Beneficiary's work will require exceptional ability.

III. CONCLUSION

The Petitioner's motion meets the requirements of a motion to reconsider, and is supported by pertinent regulatory provisions. Upon review, the evidence of record establishes that the Beneficiary meets the minimum job experience requirements for the position, and that his intended work will require exceptional ability.

ORDER: The motion to reconsider is granted and the appeal is sustained.

Cite as *Matter of C-D-I- Inc.*, ID# 1259948 (AAO June 28, 2018)